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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of JOAN and ROBERT BOOTH.	
JOAN BOOTH, Respondent, v. ROBERT BOOTH, Respondent; RHONDA BAROVSKY, Respondent; MAUREEN BRYAN-FURGURSON, Appellant.	A127140 (Contra Costa County Super. Ct. No. D03-04808)

Appellant Maureen Bryan-Furgurson (Bryan-Furgurson), attorney for respondent Joan Booth in this child custody proceeding, appeals from a sanctions order arising out of a discovery dispute. Bryan-Furgurson contends the trial court abused its discretion in imposing sanctions, the sanctions amount is arbitrary and excessive, and there was insufficient notice and opportunity to be heard. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The trial court appointed Rhonda Barovsky (Barovsky) to serve as an expert under Evidence Code section 730, which authorizes the court to appoint an expert to

investigate, prepare a report or testify in connection with a matter on which expert evidence is or may be required. (Evid. Code, § 730.)

In 2006, Bryan-Furgurson served Barovsky with a deposition subpoena requesting personal appearance and documents. Barovsky provided her "entire case file" as of that time to Bryan-Furgurson, who subsequently cancelled the deposition. The trial in the child custody dispute was then continued until late 2008.

A second deposition of Barovsky was set for October 16, 2008, and Bryan-Furgurson subpoenaed Barovsky to produce additional documents. At the deposition, Barovsky felt "threatened" by Bryan-Furgurson's questions, giving rise to "legal questions and concerns" sufficient for Barovsky to feel it was necessary to have legal representation. Thereafter, her husband, attorney Michael Freund (Freund), represented her in the matter. Freund contacted Bryan-Furgurson's cocounsel, Seth Goldstein (Goldstein), and faxed several sets of requested documents to him.

On November 6, 2008, Bryan-Furgurson filed an order to show cause and affidavit for contempt (OSC) claiming Barovsky had failed to produce several documents regarding her qualifications as an expert and other information gathered during her investigation. Bryan-Furgurson further averred in her affidavit that the "citee was served with a copy of the order." However, Bryan-Furgurson in fact never served the OSC because she was "hoping" the matter would be resolved "without serving it."

Barovsky was deposed again on November 5, this time represented by Freund. Bryan-Furgurson made no mention of the OSC, which was still not served and scheduled for hearing on November 20 (then continued to November 26).

Freund learned about the OSC and contempt hearing on November 20, 2008, through Peter Langley, counsel for the father, Robert Booth. Freund was "outraged" and called Bryan-Furgurson immediately. Bryan-Furgurson agreed to take the hearing off calendar if Freund provided additional documents. Freund faxed several sets of documents, along with a declaration by Barovsky regarding a document she could not find. Despite contacting Bryan-Furgurson several times, Freund received no confirmation she had, indeed, taken the hearing off calendar.

Having heard nothing from Bryan-Furgurson, Barovsky and Freund appeared at the November 26 contempt hearing, even though Barovsky had never been served with the OSC. When the court asked why Barovsky had not been served and the matter was still on calendar, Goldstein stated he and Bryan-Furgurson had hoped to settle the matter beforehand. The court dismissed the OSC because it had not been served, whereupon Freund requested sanctions and attorney fees. The trial court denied the request and advised Freund to make a written application with notice.

In January 2009, Freund filed a notice and motion for sanctions against Bryan-Furgurson, but then took it off calendar. In April 2009, Freund filed a revised motion, requesting a total of $8,330 in sanctions for attorney fees, Barovsky's charge for appearances, and filing costs. The trial court issued a tentative ruling granting the motion and awarding $1,400 in sanctions payable to Barovsky and $250 in sanctions payable to the court "as an affected party." Bryan-Furgurson contested the tentative ruling, and the motion was heard on September 14, 2009.

At the hearing, the court gave Bryan-Furgurson the choice of arguing for herself or having her cocounsel, Goldstein, argue the matter. Bryan-Furgurson had Goldstein take over. The trial court then denied Goldstein's request to call Bryan-Furgurson as a witness, stating "this is a motion . . . not a trial." After hearing argument by both sides, the trial court adopted its tentative ruling.

In its written order, the trial court stated Barovsky, as an expert witness, did not have "standing," herself, to make a motion for sanctions. Nevertheless, the court found "no substantial justification" for Bryan-Furgurson keeping the OSC regarding contempt on calendar and "not appri[s]ing the expert or the [c]ourt until the day of the hearing that she intended to take the motion off calendar." Accordingly, the court, on its own motion, imposed the same amount of sanctions identified in its tentative ruling, $1,400 to be paid to Barovsky and $250 to be paid to the court. This timely appeal followed.[1]

[1] On the basis of the trial court's "no standing" conclusion, Bryan-Furgurson urges this court to disregard Barovsky's respondent's brief. However, the sanctions order is based on conduct in which Barovsky was directly involved, and as an expert appointed

DISCUSSION

The Trial Court Did Not Abuse Its Discretion in Imposing Sanctions

Sanctions for misuse of the discovery process are governed by Code of Civil Procedure section 2023.030.[2] This section provides that a court "may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. . . ." (§ 2023.030, subd. (a).) Examples of misuse of discovery process are listed in section 2023.010, but the list is not exhaustive. (§ 2023.010.)

We review a trial court's determination to impose discovery sanctions for abuse of discretion. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1217.) " 'We resolve all evidentiary conflicts most favorably to the trial court's ruling [citation], and we will reverse only if the trial court's action was " ' "arbitrary, capricious, or whimsical." ' " [Citation.]' [Citations.] ' "It is [appellant's] burden to affirmatively demonstrate error and, where the evidence is in conflict, this court will not disturb the trial court's findings." [Citation.]' " (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286 (*Clement*).)

The trial court concluded there was no justification for Bryan-Furgurson's maintaining the hearing date for the OSC after failing to serve the order. Bryan-Furgurson contends she had substantial justification for keeping the OSC on calendar—to "ensur[e] compliance" from the expert. She asserts Barovsky and her counsel "never provided the requested statement of due diligence that all requested records had been produced." As the trial court observed, however, Bryan-Furgurson should have done one

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by the court, she has a clear interest in having the court's order sanctioning inappropriate conduct by counsel in connection with her services as an expert sustained. Barovsky also is a recipient of the bulk of the sanctions award, and the superior court's register of actions indicates Barovsky was "added as a party" on January 16, 2009. We therefore consider Barovsky akin to a real party in interest, who can properly submit a brief urging affirmance of the order.

[2] All further statutory references are to the Code of Civil Procedure.

of two things: served the OSC and continued the hearing, or taken the matter off calendar. There was no justification for taking up calendar space and inconveniencing the court by *not* serving the OSC or *not* taking the matter off calendar. While Bryan-Furgurson claims she would have continued the matter if given a chance, she never actually requested a continuance. Furthermore, requesting a continuance on the day of the hearing would still have wasted the trial court's and Freund and Barovsky's time.

Bryan-Furgurson attempts to characterize her attack on the sanctions order as a substantial evidence challenge, asserting there was no abuse of process because she did not keep the OSC on calendar for an improper purpose, but rather to ensure compliance from the expert. Even assuming a substantial evidence challenge is proper on this record, ample evidence supports the trial court's abuse of process determination.[3] Bryan-Furgurson acknowledged she never served Barovsky, and she admittedly did not contact the court to take the matter off calendar. Accordingly, Barovsky and her counsel were forced to needlessly appear in court, and the court's time likewise was needlessly wasted on the matter. Bryan-Furgurson's actions were especially galling given the seriousness of a contempt charge and the potential severity of penalties for contempt, and the fact she and her cocounsel were in communication with Barovsky and her counsel in the days preceding the OSC hearing but maintained the court date well aware of the procedural infirmity barring any determination of contempt.

Bryan-Furgurson complains the trial court succumbed to an "inflammatory" misrepresentation by Freund that Bryan-Furgurson had perjured herself by marking the box on the OSC form stating "citee was served with a copy of the order." She further complains Freund misrepresented that Barovsky had fully complied with the subpoena for documents. Neither complaint is warranted.

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[3] Under the familiar tenets of substantial evidence review, we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 447.)

Regarding the first alleged misrepresentation, Bryan-Furgurson contends the box on the OSC form refers to service of the subpoena, not the OSC itself. To begin with, the trial court did not expressly rely on this point as grounds for its sanctions order. Furthermore, Bryan-Furgurson is incorrect. The phrase "citee was served with a copy of the order" on the OSC form does refer to the OSC itself. The OSC form makes no reference to a subpoena; the form requires only that the citee must have "willfully disobeyed certain orders of this court." (See, e.g., § 1209, subd. (a) [including as grounds for contempt "[d]isorderly, contemptuous, or insolent behavior toward the judge while holding the court," "[a] breach of peace," and "[m]isbehavior in office"].) Thus, since Bryan-Furgurson admittedly had not served the OSC on Barovsky, Freund was correct in arguing she had improperly checked the box on the OSC indicating she had done so. Moreover, the meaning and requirements of the OSC were a legal question for the court to decide and not matters as to which Freund could make any alleged "misrepresentation."

Regarding the issue of Barovsky's compliance with the subpoena, Bryan-Furgurson contends Freund misunderstood the declaration of due diligence. The parties still disagree as to what documents Bryan-Furgurson requested and whether Barovsky complied with her request. But this dispute is not relevant to the issue of Bryan-Furgurson's abuse of process. Even if Barovsky was noncompliant, Bryan-Furgurson was not justified in keeping the OSC on calendar without serving it. Indeed, if Bryan-Furgurson wanted to obtain compliance with her discovery requests as she understood them, then she should have either served the OSC and proceeded against Barovsky, or taken the matter off calendar and communicated with Barovsky further. But, instead, Bryan-Furgurson kept the OSC on calendar, and showed up in court stating she had no intention to "do anything other than continue the matter until she could obtain the declaration of due diligence" or to "arraign her that day" *if* Barovsky waived service by appearing in court. As we have explained, the trial court was fully justified in concluding this strategy was an abuse of the court's process and sanctioning Bryan-Furgurson for wasting everyone's time.

The Trial Court Did Not Abuse Its Discretion As to the Amount of the Sanctions

Bryan-Furgurson contends the court abused its discretion in awarding sanctions in the amount of $1,400 to Barovsky because it was "an arbitrary amount, which is not based on evidence submitted by her or her counsel."

Monetary discovery sanctions under section 2023.030 are compensatory only, and may not exceed the reasonable expenses incurred. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262-263 (*Ghanooni*); *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1179 [decided under former version of statute].) Reasonable expenses may include attorney fees, filing fees, referee fees, and other costs incurred. (§ 2023.030, subd. (a), *Clement*, *supra*, 177 Cal.App.4th at p. 1285; *Ghanooni*, *supra*, 20 Cal.App.4th at p. 262.) We " 'resolve all evidentiary conflicts most favorably to the trial court's ruling' " and reverse only if the court's action was arbitrary or capricious. (*Clement*, *supra*, at p. 1286.)

Freund filed a declaration in support of the motion for sanctions, which contained a comprehensive summary of his work on the case. The time sheet tallies 20 hours spent in preparing for and attending the OSC hearing and the sanctions hearing, charged at $350 an hour, for a total of $7,000. Freund's declaration indicates he spent a total of 1.2 hours reviewing the order to show cause and other documents and telephoning and drafting a letter to Bryan-Furgurson before spending 2.3 hours associated with appearing at the hearing on November 26, 2008.[4] Freund declared he spent an additional 16.5 hours preparing the motion for sanctions and appearing at the hearings. The trial court's tentative ruling reduced that amount to $1,400, which was based on reasonable attorney fees (assessed at $350 an hour) associated with the OSC hearing: four hours for preparation, appearance in court, and travel. In its final written order after the hearing, the court imposed sanctions on Bryan-Furgurson of $1,400 to be paid to Barovsky as "the reasonable expenses of the section 730 expert to attend the OSC re contempt hearing."

[4] In an attempt at legal legerdemain, Bryan-Ferguson claims the court erred because "nothing in Mr. Freund's declaration . . . says he prepared for the arraignment." There was no arraignment—the court dismissed the OSC for failure to serve.

While Bryan-Furgurson now claims the sanctions awarded exceeded "the reasonable expenses incurred," she, like the sanctioned party in *Ghanooni* "produced no counterdeclaration" showing the expenses were not incurred or not reasonable. (*Ghanooni, supra*, 20 Cal.App.4th at p. 262.) Accordingly, "the court's finding as to reasonable expenses is supported by the uncontradicted evidence." (*Ibid.*) Not only is the "fee" amount of the sanctions supported by the record, it is significantly less than what could have been awarded. We find no abuse of discretion.

Bryan-Furgurson Had Sufficient Notice and Opportunity to be Heard

Finally, Bryan-Furgurson contends she had insufficient notice and opportunity to be heard in connection with the trial court's "sua sponte" imposition of sanctions. She relies on *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651-652, which holds "basic protections of due process" must be followed before the court imposes sanctions on an attorney. Due process requires "notice, an opportunity to respond, and a hearing." (*Id.* at pp. 652, 654.)

" '[A]dequacy of notice should be determined on a case-by-case basis to satisfy basic due process requirements. The act or circumstances giving rise to the imposition of expenses must be considered together with the potential dollar amount.' " (*Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1081 (*Seykora*), quoting *Lesser v. Huntington Harbor Corp.* (1985) 173 Cal.App.3d 922, 932.) The purpose of the notice requirement is to give the party adequate time to prepare for the hearing. (*Seykora*, at p. 1081.) Bryan-Furgurson was on full notice as to the basis for the sanctions and had ample time to oppose their imposition. Barovsky filed her revised motion for sanctions in April 2009. The trial court then issued a tentative ruling awarding sanctions. The hearing did not occur until almost five months later, on September 14, 2009. Thus, Bryan-Furgurson clearly was on notice and had ample time to file written opposition, as well as to argue against sanctions at the hearing.

Bryan-Furgurson contends she had no notice the court itself was going to impose sanctions and claims the court erroneously relied on Barovsky's "invalid" notice and motion. As we have discussed, however, the purpose of due process notice requirements

is to give the party against whom an order is sought a clear explanation of the basis for the requested order and an opportunity to oppose the request. Bryan-Furgurson was given full notice of the basis of the sanctions request and had ample opportunity to file opposition. Further, she has not suggested how her opposition would have been any different had the court issued its own notice and motion.

An opportunity to be heard does not mean the trial court is obliged to hold an evidentiary hearing. (*Seykora*, *supra*, 232 Cal.App.3d at p. 1082.) Rather, the trial court has discretion in conducting the proceedings, so long as the parties have a reasonable opportunity to present their side of the issue. (*Ibid.*) The substance of the proceedings is more important than the form. (*Id.* at p. 1083.) The court did not allow Bryan-Furgurson to testify or call witnesses, but did allow her an opportunity to present her case. The court had declarations from Bryan-Furgurson, Goldstein, Barovsky, and Freund, and allowed counsel to argue their respective positions. Bryan-Furgurson thus had an adequate opportunity to be heard, and the trial court did not abuse its discretion in denying an evidentiary hearing.

DISPOSITION

The order imposing sanctions on Bryan-Furgurson is affirmed. Barovsky shall recover her costs on appeal.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.